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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 954

ERWIN H. EZZES,
Petitioner,

—against—

SOL A. DANN, *et al.* and MARY L. GALLO, *et al.*,
Respondents, Plaintiffs below,

and

CHRYSLER CORPORATION, *et al.* and
PAUL C. ACKERMAN, *et al.*,
Respondents, Defendants below,

and

HERMAN KOENIGSBERG and VIRGINIA S. JUDSON, *et al.*,
Respondents, Objectors below,

and

ARTHUR HOFFMAN,
Petitioner (No. 893, Oct. Term 1964),
Objector below.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF OF CERTAIN DEFENDANTS BELOW, RESPONDENTS IN OPPOSITION

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BRIEF OF CERTAIN DEFENDANTS BELOW, RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the Supreme Court of the State of Delaware is reported at 205 A.2d 343 and is set forth in full in the Appendix to the Hoffman Petition in No. 893 (pp. 9 to 30).* The opinions of the Court of Chancery of Delaware are reported at 198 A.2d 185 and are set forth in full at RA 61-105.

Jurisdiction

The Court lacks jurisdiction since the opinion of the Supreme Court of Delaware is dated November 17, 1964 and was entered November 18, 1964 and the petition for a writ of certiorari was not filed until March 4, 1965, more than 90 days later.

Petitions for re-argument of (1) Sol A. Dann, respondent, plaintiff below, (2) respondents, certain plaintiffs below in Civil Action No. 1330, other than Sol A. Dann, and (3) Herman Koenigsberg, respondent, objector below, were denied December 4, 1964 (PA 31-32).

Erwin H. Ezzes, Petitioner, an objector below, did not file a petition for re-argument with the Supreme Court of Delaware. The mandate of the Supreme Court of Delaware was issued on December 7, 1964 and was entered in the Court of Chancery on December 8, 1964.

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* Further references to numbered pages of appendices will be preceded by the following abbreviations: AA for Appendix annexed hereto; EA for Petitioner Ezzes' Appendix in No. 954, Oct. Term 1964; PA for Petitioner Hoffman's Appendix in No. 893, Oct. Term 1964; RA for Appendix of Certain Defendants Below, Respondents in Opposition in No. 893, Oct. Term 1964; DA for Appendix of Certain Defendants Below, Appellees filed in the Supreme Court of Delaware.

Questions Presented

1. Since Petitioner did not petition the Supreme Court of Delaware for reargument of its decision dated November 17, 1964 and entered November 18, 1964, is his petition for certiorari to this Court, filed March 4, 1965, untimely because not applied for within ninety days after the entry of the decision of the Supreme Court of Delaware?

2. Since Petitioner did not specially set up or claim in any of the courts below, nor did those courts decide, any federal question of substance does this Court have jurisdiction of the case under 28 U.S.C. §1257(3)?

3. Since the decision of the highest court of Delaware can be wholly sustained on independent grounds of state law, does this Court have jurisdiction of the case under 28 U.S.C. §1257(3)?

4. Where there is no violation of Section 14(a) of the Securities Exchange Act of 1934, should this Court grant certiorari to consider the abstract question of whether an alleged violation of Section 14(a) would prohibit a state court from approving a beneficial settlement of derivative stockholder suits without specifically referring to the 1934 Act, although, in approving the settlement, the state court applied standards of state law which are not different from the applicable standards under Section 14(a)?

Statutes and Rules Involved

The pertinent provisions of the statutes involving the jurisdiction of this Court on review by writ of certiorari, 28 U.S.C. §1257(3) and 28 U.S.C. §2101(c) are set forth at AA 25. The pertinent provision of Rule 23(1)(f) of the Revised Rules of the Supreme Court of the United States is set forth at AA 25-26. The pertinent provision of Rule 14 of the Supreme Court of Delaware is set forth at AA 26. The pertinent provisions of the Securities Exchange Act of 1934, 15 U.S.C. §78n(a) and §78aa are set forth at EA 25-26. The pertinent provision of Rule 14a-9, 17 C.F.R. 240.14a-9 is set forth at AA 27. The pertinent provision of Item 9 of Schedule 14A—Information Required in Proxy Statement, following 17 C.F.R. §240.14a-11, is set forth at AA 28.

Statement

The Court of Chancery and the Supreme Court of Delaware have approved as a matter of business judgment the settlement of two stockholders' derivative suits brought by various stockholders of Chrysler Corporation ("Chrysler"). The Stipulation of Settlement provided that the two actions below, together with other related actions, be dismissed with prejudice and releases be delivered to the defendants, except defendant Newberg; in return Chrysler's Incentive Compensation Plan was to be amended to reflect certain changes found to be advantageous to Chrysler's stockholders.

Petitioner now argues for the first time that the settlement should be set aside because of an alleged violation of the Securities Exchange Act of 1934 and because he has been allegedly deprived of property without due process of law. In the courts below, however, Petitioner objected to the settlement basically on the grounds that certain of the claims to be settled were meritorious and valuable and that the change in Chrysler's Incentive Compensation Plan was not desirable and did not afford adequate consideration for the settlement. All of these claims were based on common law and after full consideration were found by both of the Delaware courts to be without merit and of no value. The Court of Chancery concluded (RA 86):

> "Having weighed the claims asserted by the objector Ezzes to have merit and the possible defenses, I conclude that the probability of success in litigating any of such claims is so remote as to entitle them to practically no consideration in evaluating the fairness of the terms of settlement."

After considering the possible prospective application of the change in the Incentive Compensation Plan, the Court of Chancery wrote (RA 99):

> "While it is true that there is no assurance that during the 'term' of this plan there will be a monetary 'saving' to the corporation, the fact is that business-wise it should benefit the corporation."

Both Delaware courts concluded that the settlement was fair and in the best interests of Chrysler's stockholders.

The Court of Chancery described the change in the Incentive Compensation Plan as follows (RA 89-90):

> "The proposed plan, as modified in accordance with the terms of the settlement, provides that for the years 1963 through 1969, incentive compensation awards may be made only for those years when the sum of (1) consolidated net earnings of the corporation and consolidated subsidiaries (as reported in the annual report to the stockholders) *after* taxes on income, and (2) provision for incentive compensation, and (3) interest on long-term debt of the corporation, exceeds 5½% of the stockholders' investment (capital, surplus and retained earnings) in the corporation and consolidated subsidiaries and long-term debt of the corporation. The total provision for awards in any year is limited to the lesser of 12% of such excess or the aggregate amount of all dividends declared upon the common stock of the corporation during the year.
>
> "The basic changes brought about by the modification have been the conversion of what was previously a before-tax incentive plan into an after-tax plan, an increase in the set-aside (i.e., the return on the stockholders' investment before payment of any incentive compensation under the plan), and an increase in the percentage of compensation to be awarded after deduction of the set-aside.
>
> "Thus, the 1963 formula requires a higher level of earnings, before any award of incentive compensation may be made, by reason of the higher set-aside. Until the 'cross-over point' is reached (i.e., the point at a still higher level of earnings where the amount of the bonus fund would be the

same under both formulas), the higher set-aside under the 1963 formula would more than offset the higher rate of bonus so that a smaller bonus fund would be created under the new formula than under the 1956 formula. But once the level of earnings rises above the cross-over point a larger bonus fund will result under the 1963 formula than under the 1956 formula. However, under the 1963 formula, as a result of the increase in retained earnings, the set-aside in each succeeding year becomes greater than it would have been under the 1956 formula thereby requiring an even better earnings performance in each of these years to obtain the same bonus fund." (footnotes omitted)

After considering Chrysler's earnings prospects and the objectors' "selective use of available financial data with which in my opinion one may either agree or disagree" (RA 94), the Court of Chancery wrote (RA 95):

> "It is fair to say I think that no one can predict with certainty what degree of success Chrysler will have in its operations in future years. Although Chrysler enjoyed a series of profitable years from 1950 to 1957, it showed a loss in 1958 and 1959. No one will deny, moreover, that the earnings of a major business corporation engaged in the production of automobiles are subject to a number of variables, some of which have little, if any, relationship, to the amount of effort exerted by management. . . ."

The Stipulation of Settlement was presented to the court on March 6, 1963. Thereafter, a court-approved notice describing in full the considerations affecting

and the terms of the settlement was sent to the stockholders. A meeting of the stockholders was held on April 16, 1963, at which time they overwhelmingly approved the change in the Incentive Compensation Plan. Both the court-approved notice and the proxy statement mailed together to Chrysler's stockholders in connection with the April 1963 meeting explained in extensive detail the nature and effect of the proposed change in the Incentive Compensation Plan. The stockholders were well aware of the favorable earnings prospects of Chrysler which Petitioner now contends were not adequately disclosed. Indeed, at about the same time the stockholders' meeting was held, Petitioner filed his objections to the settlement in which he displayed his own knowledge of these matters, asserting, that "Chrysler and the remainder of the automobile industry, appear to be in the midst of an important business upsurge" and that on the basis of Chrysler's income trend, "the beneficiaries of the changed Incentive Plan will actually benefit from the change" (AA 30, 29).

Thereafter, in April and May, 1963, hearings were held on the settlement during which discovery was made and evidence adduced on Chrysler's earnings prospects and the availability of such information to the directors and stockholders. The testimony showed what is self-evident, that while the prospects were favorable, no one could say with any certainty what the actual results would be for the full year 1963 (DA 108, 110-11, 135-38, 144-47).* Whereas then and more so at the time the proxy was sent

* For example, in 1959 Chrysler earned $58 million in the first six months of the year, but ended the year with a loss of $5 million as a result of losses of $63 million in the third and fourth quarters (AA 31).

out, in March 1963, the 1963 earnings were uncertain, the situation had changed by the time the court had issued its decision on December 31, 1963. By the end of 1963, it was clear that the new plan would make available for distribution to Chrysler's employees a larger fund than would have been available under the old plan. (Contrary to Ezzes' oft-repeated assertions, the formula merely provides a maximum amount which may be distributed as incentive compensation. The amount actually to be distributed is determined by the disinterested members of Chrysler's Board of Directors and, in fact, in many years the disinterested directors determined to disburse substantially less than the maximum available for distribution.) The Court of Chancery found that the change in the plan was proper, indeed a "benefit" to the corporation. Nevertheless, because of the special situation of the defendants who are beneficiaries under the plan, the court placed a qualification on its approval of the settlement, writing (RA 99):

> "Thus, even with due allowance for the fact that the future operation under the plan is an 'unknown', I do not believe that it is appropriate for the director defendants who are beneficiaries under the plan to receive the fruits of the new plan for 1963. I will therefore approve the terms of settlement on the condition that the director defendants who are beneficiaries under the plan agree that as to the year 1963 they will derive no added financial reward solely as a result of the modification."

After this decision, certain of the objectors, including Petitioner, moved for reargument and urged the

court to extend the condition to all of Chrysler's employees who are beneficiaries under the plan for the year 1963 only. This the court refused, explaining that the directors were obliged to consider what the true situation was when the settlement terms were finalized and ripe for submission to the court and that they had a continuing duty to agree only to what was then fair. Under those circumstances, the court found that these defendants were in a position where at least for the year 1963 they could obtain a complete release from the litigation not only without paying anything personally but by finally approving a revised plan which would probably assure them even greater compensation payments for 1963. The court also explained that the other beneficiaries of the plan were not involved in approving the change, and not being defendants, were not receiving any benefit for the release of corporate causes of action against them. In further explanation, the court wrote (RA 104-105):

> "Moreover, in the long view of this plan one cannot say with objective assurance whether it will or will not be more beneficial to the participants. Indeed it may be less so. . . . Passing over the element of hindsight, I believe this point overlooks the fact, noted above, that we are dealing with a seven year plan. The fairness test cannot be applied by looking at the results of only one year. The imposition of the condition on the defendant directors was imposed for reasons special to them."

The Supreme Court of Delaware reviewed the exercise of business judgment by the Court of Chancery and appraised the factors affecting the settlement as follows (PA 25-28):

"Initially it is obvious that the settlement approved in this litigation does not take the traditional form of the payment of a *quid pro quo* by the defendants. The reason for this is obvious. Such a payment would be nothing more than a buying-off of the plaintiffs for the dismissal of worthless claims. . . .

* * * *

". . . Certainly, it is to the benefit of Chrysler stockholders to end this litigation. There is no hope of substantial recovery for their benefit by the continuance of the litigation, but there is assurance of cost to them in the event it is prolonged. Furthermore, it is at least arguable that the new Incentive Compensation Plan in the long run will benefit the stockholders of Chrysler by reason of the increased requirements of the so-called set-aside.

"It seems to us to make little difference under the circumstances of this litigation that the individual defendants who receive releases as a part of this settlement have in fact made no monetary payment in settlment. This, we think, necessarily follows from the fact that the claims asserted against the individual defendants have been found to be devoid of merit. . . .

* * * *

"The appellants, Sandler objectors, argue that the settlement should be disapproved because it confers no benefit upon Chrysler and because, for the year 1963, the amount which may be awarded as incentive compensation under the new Plan is some $1,500,000 in excess of that which could

have been awarded under the old Plan. The argument is, of course, primarily based upon the fortuitous circumstance that Chrysler's earnings for 1963 were greatly larger than for 1962. While the directors and officers of Chrysler may have realized the potentially greater earnings for that year, that fact has been taken care of by the Chancellor in the condition he imposed upon his approval of the settlement, that such persons not share in the incentive compensation award for 1963.

"A further answer to these objectors' argument is that, in all probability, over the long span of the future, the Plan in its operation will result in benefit to Chrysler's stockholders. Admittedly, no one can predict Chrysler's future earnings but, certainly, in a business such as the automobile industry, profits take their ups and downs and may well equalize themselves over a course of years."

At no time during any of the proceedings in the Court of Chancery nor in any paper submitted to the Court of Chancery did Petitioner raise any federal question or so much as refer to the Securities Exchange Act of 1934 or the Constitution of the United States. On the appeal to the Supreme Court of Delaware, Petitioner for the first time raised a question as to the adequacy of the information available to the stockholders regarding Chrysler's earnings prospects. After these respondents objected that the point was not properly before the Delaware Supreme Court since Petitioner had not raised it below, and after these respondents showed that all of the allegedly

omitted information appeared in Chrysler's 1962 Annual Report and was otherwise available to the stockholders, Petitioner for the first time in his reply brief even so much as referred to the regulations of the Securities and Exchange Commission relating to proxy solicitations, but did not assert there was a violation of the 1934 Act.

The Delaware Supreme Court rejected Petitioner's objection to the approval of the change in the plan and the alleged failure to disclose, writing (PA 29):

> ". . . these matters were largely disclosed to the stockholders in the Annual Report for 1962 which was sent to them at or prior to the starting of solicitation of proxies. Indeed, it would seem as though a large part of the information Ezzes says was withheld was a matter of general public knowledge."

The Supreme Court of Delaware made no reference to the Regulations of the Securities Exchange Commission, the Securities Exchange Act, or any question of federal law. It stated that it was satisfied that the stockholders were fully informed and acted in the light of that information and that in any event the condition imposed by the Court of Chancery adequately took care of any objection. Notwithstanding, the Delaware Supreme Court's failure to refer to any federal question, Petitioner did not seek reargument or press any federal question in any way. For the first time, in this Court, Petitioner urges that Chrysler's 1963 proxy statement violated Section 14 of the Securities Exchange Act of 1934 and even more remarkably, asserts that he has been deprived of property without due process because of the alleged

failure of the state courts to consider the alleged violation of the Act, which he had not previously claimed.

Although it raises no federal question, Petitioner argues that the Chrysler Board of Directors illegally presented to the stockholders the proposal to change the incentive compensation plan because the Board action was not by a majority of disinterested directors and therefore in violation of Chrysler's by-laws. On this question of purely state law, however, the Delaware Supreme Court refused to find a violation, and further held as a matter of state law that stockholder approval cured any arguable technical defect.

ARGUMENT

1. A petition for writ of certiorari filed with the Supreme Court of the United States later than ninety days after the entry of the judgment or decree of the highest court of a state is untimely. 28 U.S.C. 2101(c).

The opinion of the Supreme Court of Delaware was dated November 17, 1964 and entered November 18, 1964. The petition for writ of certiorari was filed with this Court March 9, 1965, one hundred and six days after the entry of the lower court's opinion.

A timely petition for rehearing of the decree below will normally toll the running of the ninety day period. *Department of Banking* v. *Pink,* 317 U.S. 264, 266 (1942). However, Petitioner did not peti-

tion for reargument in the Supreme Court of Delaware. Although other parties did petition for reargument, one party's petition for reargument does not extend another party's time to petition for certiorari. *Zimmern* v. *United States,* 79 F.2d 703 (5th Cir. 1935), *rev'd on other grounds,* 298 U.S. 167 (1936); *cf. Federal Trade Commission* v. *Minneapolis-Honeywell Co.,* 344 U.S. 206, 211 (1952) (substantive change in a judgment not affecting the portion sought to be reviewed does not extend the time for seeking review of the unchanged portion).

Petitioner would have this Court believe that the mandate of the Supreme Court of Delaware, issued December 7, 1964 and entered in the Court of Chancery on December 8, 1964 is the final judgment of the Supreme Court of Delaware. But by the very language of the mandate, this is not so (EA 21):

> "Whereas, by appropriate proceedings the said cause was duly appealed to the Court, and *after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on November 18, 1964,* a certified copy of which is attached hereto;" (emphasis supplied)

A mandate of the Supreme Court of Delaware is issued as of course by the clerk upon the expiration of the period allowed for the filing of a petition for reargument unless otherwise ordered by the court. *Rule 14 of the Supreme Court of Delaware.* It can readily be seen that the issuance of a mandate and its entry in the inferior state court are purely ministerial functions and do not alter rights already ad-

judicated. The lower state court is not vested with any discretionary authority.

In making the determination whether there has been a final judgment or decree of the state court, this Court is no longer bound by the "face of the judgment" rule. *Gospel Army* v. *Los Angeles,* 331 U.S. 543, 546 (1947). This Court examines not only the opinion of the state court, *Clark* v. *Williard,* 292 U.S. 112, 118 (1934), as well as the entire record to determine whether "there is nothing more to be decided", *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U.S. 69, 72 (1946), but also the local law to determine what effect the judgment has under state rules of practice. *Brady* v. *Terminal Railroad Association,* 302 U.S. 678 (1937); *Brady* v. *Southern Ry. Co.,* 319 U.S. 777 (1944).

The opinion of the Supreme Court of Delaware (PA 9-30) clearly terminates the litigation between the parties on the merits of the case. In addition, the local practice of Delaware is to treat the opinion of its Supreme Court as the final judgment or decree in an action. Rule 14 of the Supreme Court of Delaware (AA 26) states in part:

> "In each cause *finally determined in this court,* a mandate or other appropriate process shall be issued to the court below and shall be accompanied by a copy of the opinion of this Court." (emphasis supplied)

This Court has ruled that the order or judgment of the highest state court is controlling as to the running of the time to petition for certiorari even though

under state practice the actual judgment is that entered by an inferior state court on remittitur, as in New York, *Department of Banking* v. *Pink,* 317 U.S. 264, 267 (1943), or on rescript, as in Massachusetts, *Cole* v. *Violette,* 319 U.S. 581, 582 (1942). Furthermore, a state rule that a decision "becomes final 30 days after filing" does not extend the time, which runs from the date of the judgment. *Market Street Railway* v. *Railroad Commission,* 324 U.S. 548, 550-52 (1945).

Petitioner's time to apply to this Court for review by certiorari began to run from the date of entry of the opinion of the Supreme Court of Delaware, November 18, 1964. Timely petition for reargument was not made by Petitioner. February 16, 1965 was the last day for filing a timely petition for writ of certiorari in this Court. A March 4, 1965 filing was too late to give this Court jurisdiction.

2. Any title, right, privilege or immunity claimed under a federal statute must have been specially set up or claimed in the courts below to give the Supreme Court jurisdiction. 28 U.S.C. §1257(c). The party invoking the jurisdiction of the Supreme Court has the burden of affirmatively showing by the record that the federal question was properly raised, so that the failure of the state court to deal with it in terms cannot be considered, if such failure is grounded upon want of proper presentation. *Chicago Ind. & L. Ry. Co.* v. *McGuire,* 196 U.S. 128, 131-33 (1905); *Memphis Natural Gas Co.* v. *Beeler,* 315 U.S. 649, 651 (1942). It is also essential that there be a final judgment and decree passing upon the federal point rendered "by the highest court of a state in which a decision could

be made." 28 U.S.C. §1257. As was stated in the *Chicago Ind. & L. Ry.* case (196 U.S. 133):

> "'. . . the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.' This case is the not infrequent one of an attempt to clutch at the jurisdiction of this court as an afterthought, when all other resources of litigation have been exhausted."

Petitioner asserts that the proxy dated March 4, 1963 sent to Chrysler stockholders soliciting their votes for approval of the change in the Incentive Compensation Plan was false and misleading and violated Section 14(a) of the Securities Exchange Act of 1934 (Pet. p. 7) and that the decision below deprived him of property without due process (Pet. p. 16-17). But nowhere in his petition or appendix does he indicate that such a federal question was raised in the state courts.

It is too late to raise the federal question for the first time in the petition to this Court as it is not part of the record of the state court proceeding and it is that record which must affirmatively show a raising of the federal issue. See *White River Lumber Co.* v. *Arkansas ex rel. Appelgate,* 279 U.S. 692, 700 (1929).

Rule 23(1)(f) of this Court requires pertinent quotations of specific portions of the record to be made in Petitioner's statement of his case to show that a federal question was timely and properly raised in the

court of first instance and the appellate court. Petitioner must "specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised . . ." Petitioner has not and cannot comply with this rule.

Nor has Petitioner carried out his burden of providing this Court with a certificate from the Supreme Court of Delaware to the effect that a federal question was raised and decided. See *Herb* v. *Pitcairn*, 324 U.S. 117, 127 (1945).

Because no federal question of substance has been specially set up or claimed or decided by the highest court of Delaware, the petition for certiorari should be denied.

3. It is well settled that this Court will decline to review state court judgments which can be wholly sustained on adequate and independent grounds of state law. *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 634-36 (1875), *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945).

> "The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the

> same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn, supra* at 125-26.

Thus, even if a federal claim is properly raised, as it was not by Petitioner, and the state court declines to consider it and renders its decision solely on non-federal grounds, this Court has declined jurisdiction. *Wood* v. *Chesborough,* 228 U.S. 672, 677 (1913).

The state grounds for the decision of the Supreme Court of Delaware are both independent of any federal grounds and are wholly adequate to support the decision, as can readily be seen from the opinion of that court (PA 9-30).

The State of Delaware has consistently adhered to the principle that a court, when called upon to approve a settlement and compromise of a pending litigation, need only consider the nature of the claims, the possible defenses to them and the legal and factual obstacles facing the plaintiff in the event of a trial, and exercise a business judgment in determining whether the proposed compromise is reasonable in the circumstances. *In re Ortiz' Estate,* 26 Del. Ch. 240, 253-54, 27 A.2d 368, 374 (1942); *Perrine* v. *Pennroad Corp.,* 29 Del. Ch. 531, 550, 47 A.2d 479, 488 (1946). The Supreme Court of Delaware in deciding that the settlement negotiated by the parties was, as a matter of business judgment, fair and reasonable, relied entirely on applicable Delaware law. *Kleinman* v. *Saminsky,* 200 A.2d 572, 575 (Del. 1964),

cert. denied, 13 L.Ed.2d 174 (1964) (No. 392, Oct. Term 1964); *Rome* v. *Archer,* 197 A.2d 49 (1964).

With no question as to the adequacy of the grounds of decision, and no doubt that the decision can be wholly sustained on independent grounds of state law, this Court should deny the petition.

4. Although Petitioner founds his entire argument on the bald assertion that there has been a violation of Section 14(a) of the Securities Exchange Act, he completely fails to show any tenable basis for such a conclusion. The only matters he asserts were not disclosed to stockholders were matters of public knowledge as to which he and the other stockholders were fully informed (PA 29; AA 30). Indeed, upon close examination it will be seen that Petitioner's insistence is that the proxy statement sent out in March, 1963 should have prognosticated industry sales and Chrysler's earnings for the full year 1963, which *then* would have resulted in a violation of Rule 14a-9 of the Securities and Exchange Commission and Section 14 of the Securities Exchange Act. *Union Pacific R. Co.* v. *Chicago North Western Ry. Co.,* 226 F. Supp. 400, 408-09 (N.D. Ill. 1964).

Actually, the Securities and Exchange Commission has very specifically spelled out what information should be furnished to stockholders in a proxy statement if action is to be taken with respect to any bonus, profit sharing or other remuneration plan. Item 9 of Schedule 14A of Regulation 14 of the Securities and Exchange Commission provides in part as follows:

"Item 9. Bonus, Profit Sharing and Other Remuneration Plans.

"If action is to be taken with respect to any bonus, profit sharing or other remuneration plan, furnish the following information:

* * * *

"(b) State separately the amounts which would have been distributable under the plan during *the last fiscal year* of the issuer (1) to directors and officers and (2) to employees if the plan had been in effect." (emphasis supplied)

Thus, the Commission has designated the manner in which the effect of profit-sharing plans is to be illustrated to stockholders and specified that it shall be done by applying the profit-sharing formula to the last year, which was done. Apart from this, an attempt to apply such a plan prospectively would run afoul of the very Rule upon which Petitioner relies. The Commission in its note to Rule 14a-9 explaining what it may regard as misleading within the meaning of this Rule gives as its first example the following:

"(a) Predictions as to specific future market values, earnings or dividends."

In essence, Petitioner seeks not to enforce fair standards of disclosure, but instead to deform them, trying to use Section 14(a) as the hammer. It is self-evident, as both courts below stated, that no one can predict the future and certainly no one could know almost a year in advance what the earnings level of a major industrial corporation such as Chrysler would be.

Petitioner made many unsupported charges below and each of them were carefully considered and rejected by both courts. In the face of a number of different assertions of inadequacy of disclosure, both courts found the information furnished to stockholders to be ample and full. In all of his arguments regarding the adequacy of disclosure, Petitioner invoked Delaware law and cited Delaware authorities. Petitioner at no time argued that the standards of Delaware law as applicable to this case varied in any degree from those of federal law. Indeed, for purposes of the point he now raises the standards are the same, *Kaufman* v. *Shoenberg*, 154 F. Supp. 64, 66-67 (D. Del. 1954). The Delaware Supreme Court very carefully considered Petitioner's objections as to disclosure and found them to be without substance. Petitioner never questioned the standard it applied or attempted to invoke any different federal standard.

Finally, Petitioner completely overlooks the fact that this case turns not upon mere private action, but upon steps taken in a proceeding under the aegis and control of a state court in disposing of suits committed to its jurisdiction. There is no reason or law which demands that such a court may not give such form of notice and conduct its proceedings in such a manner as satisfies it. Petitioner in no way can be said to have been injured. He was afforded and took full advantage of the opportunity for discovery and to litigate all the pertinent facts. That he tried and lost after full hearing is no cause to interfere with the state court proceeding or to extend the jurisdiction of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition should be denied.

Respectfuly submitted,

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APPENDIX

Relevant Statutes

62 Stat. 929, 28 U.S.C. 1257

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * *

(3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States.

63 Stat. 104, 28 U.S.C. 2101

* * * *

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.

* * * *

Revised Rules of the Supreme Court of the United States

Rule 23(1)(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and excep-

tions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

Rules of the Supreme Court of Delaware

Rule 14. Mandate

(1) When issued—Petition for Re-argument—Stay. In each cause finally determined in this Court, a mandate or other appropriate process shall be issued to the court below and shall be accompanied by a copy of the opinion of this Court. Such mandate, unless otherwise ordered by the Court, or unless a petition for re-argument is filed, shall issue as of course upon the expiration of the period allowed for the filing of a petition for re-argument. If the petition shall be denied, the mandate shall issue forthwith. The mandate shall, after reciting the proceedings in the court below and the hearing in this Court, direct the affirmance, reversal or modification of the judgment, decree, or order in the court below, and shall direct the court below to take such proceedings in conformity with the opinion of this Court as may be necessary. The mandate shall be signed, sealed and tested [sic] by the clerk.

* * * *

Rules and Regulations Under Securities Exchange Act of 1934

17 C.F.R. §240.14a-9

Rule 14a-9. False or Misleading Statements.

No solicitation subject to §§240.14a-1 to 240.14a-10 shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

Note: The following are some examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of this rule:

(a) Predictions as to specific future market values, earnings, or dividends.

SCHEDULE 14A

Information Required in Proxy Statement

Following 17 C.F.R. §240.14a-11

* * *

Item 9. Bonus, Profit Sharing and Other Remuneration Plans.

If action is to be taken with respect to any bonus, profit sharing or other remuneration plan, furnish the following information:

(a) Describe briefly the material features of the plan, identify each class of persons who will participate therein, indicate the approximate number of persons in each such class and state the basis of such participation.

(b) State separately the amounts which would have been distributable under the plan during the last fiscal year of the issuer (1) to directors and officers and (2) to employees if the plan had been in effect.

* * *

(1) * * *

Notice of Intention of Stockholder Erwin H. Ezzes to Appear, and Statement of Objections (Filed April 22, 1963)

* * * *

(6-7)

The spurious nature of the so called settlement proposal in the case at bar is shown not only by its failure to have the character of a true compromise, but as well by the fact that the defendants will actually benefit from the changed Incentive Plan, as follows:

(a) On the basis of Chrysler's income for 1962, the present income trend of Chrysler, and a projection of the substantial income figures of Chrysler for the first quarter of 1963, the beneficiaries of the changed Incentive Plan will actually benefit from the change.

(b) An application of the Changed Plan to the past history of Chrysler shows that if the Changed Plan had been in existence over the past years, the beneficiaries would have been entitled to more under the Changed Plan than under the Old Plan.

(c) The slight reduction under the Changed Plan in the amount of benefits allowable to the defendants when corporate earnings are in the lower earnings category, is far outweighed by the provisions made in the Changed Plan for increased benefits to the defendants when corporate earnings are in the higher earnings level category.

* * * *

Notice of Intention of Stockholder Erwin H. Ezzes to Appear, and Statement of Objections (Filed April 22, 1963)

(8-9)

(i) Even if none of the above premises were correct, it is evident that the Changed Plan seeks blanket judicial approval of matters having important future imponderables. Among these imponderables, is the question whether business conditions largely not of management's making, will result in such substantial earnings to Chrysler, that under the Changed Plan the defendants will be entitled to compensation of such magnitude that, looking back, the Changed Plan constituted a boon to them rather than the detriment which it is required to be if the Changed Plan is to be considered that which the defendants give as consideration for the release of the claims against them. The importance of this question is heightened by the fact that, according to the statistics, Chrysler and the remainder of the automobile industry, appear to be in the midst of an important business upsurge. If this were the true settlement that it is supposed to be, Chrysler would not have to determine whether to take the calculated risk that the defendants will get more in the future under the Changed Plan than they would have gotten if the Old Plan remained in effect. Since this consideration must be resolved before any judgment can be given as to the fairness of the Changed Plan as part of a so called compromise settlement, it follows that, apart from all other considerations, the proposed so called settlement should be rejected because calling for a calculated risk determination on the part of Chrysler concerning important future imponderables. * * *

* * * *

Excerpts from Objectants' Exhibit 405 in Evidence in the Court of Chancery

SALES AND NET EARNINGS

Year	Period	Car and Truck Unit Sales	Sales	Net Earnings (Loss)
			$(000,000)	
1959	1st Quarter	233,185	$ 690.5	$ 15.2
	2nd Quarter	306,369	840.9	42.8
	3rd Quarter	143,511	432.9	(34.2)
	4th Quarter	234,299	678.7	(29.2)
	YEAR	917,364	$2,643.0	$(5.4)
1960	1st Quarter	363,807	$ 925.8	$ 10.9
	2nd Quarter	330,944	825.7	12.8
	3rd Quarter	250,096	634.1	1.4
	4th Quarter	238,464	621.4	7.1
	YEAR	1,183,311	$3,007.0	$ 32.2
1961	1st Quarter	157,586	$ 431.5	$(21.9)
	2nd Quarter	214,443	563.0	6.2
	3rd Quarter	162,489	436.5	(4.8)
	4th Quarter	267,485	696.3	31.6
	YEAR	802,003	$2,127.3	$ 11.1